STATE OF MICHIGAN

COURT OF APPEALS

DEVIN DONNELLY,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
March 30, 2001

No. 220010
Wayne Circuit Court
LC No. 98-825581-CZ

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order summarily dismissing his reverse discrimination claim against defendant pursuant to MCR 2.116(C)(10). We affirm.

In 1995, plaintiff, a corrections officer with the Department of Corrections, applied for a promotion to the rank of sergeant at the Western Wayne Correctional Facility (WWCF). The complaint alleged that plaintiff was denied the promotion as a result of reverse discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.*[1] Plaintiff argues that the trial court erred in determining that plaintiff failed to set forth a prima facie case of reverse discrimination. We disagree.

We review a trial court's grant of summary disposition de novo. *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 177; 604 NW2d 772 (1999). As a preliminary matter, we reject plaintiff's assertion that summary disposition under MCR 2.116(C)(10) should be denied "where a record might be developed that leaves open an issue upon which reasonable minds might differ." In *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court articulated the proper standard for reviewing a motion for summary disposition under MCR 2.116(C)(10):

[1] On appeal, plaintiff also refers to defendant's gender discrimination. Because plaintiff did not first advance this argument in the lower court, it is not properly before this Court. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden, supra*..]

The reviewing court is required to evaluate a motion brought under MCR 2.116(C)(10) by considering the "substantively admissible evidence actually proffered in opposition to the motion." *Maiden, supra* at 121. The mere possibility that a claim may be supported by additional evidence in the future is not sufficient to withstand summary disposition. *Id.*

A review of the complaint reveals that plaintiff's reverse discrimination claim is premised on a "mixed motive" theory. A "mixed motive" discrimination claim arises where the plaintiff's proofs demonstrate that the adverse employment action can be attributed to legitimate factors, as well as legally impermissible ones. *Harrison v Olde Financial Corp,* 225 Mich App 601, 610; 572 NW2d 679 (1997); see, also, *Wilcoxon v Minnesota Mining & Mfg Co,* 235 Mich App 347, 360; 597 NW2d 250 (1999).

Plaintiff argues that he was not required to meet the burden-shifting approach of *McDonnell Douglas Corp v Green,* 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), to make out a prima facie claim of discrimination because he presented direct evidence of unlawful discrimination. Plaintiff's interpretation of the prevailing law is sound. Where a plaintiff presents direct evidence of unlawful discrimination, the *McDonnell Douglas* burden-shifting approach does not apply. *Wilcoxon, supra; Norris v State Farm Fire & Casualty Co,* 229 Mich App 231, 235; 581 NW2d 746 (1998); *Harrison, supra* at 610 n 10.

In a case involving direct evidence of unlawful discrimination, regardless of the adverse employment action taken, the plaintiff bears the burden of presenting "direct proof that the discriminatory animus was causally related to the decisionmaker's action." *Graham v Ford,* 237 Mich App 670, 677; 604 NW2d 713 (1999); *Harrison, supra* at 613. The plaintiff need not establish that race was the exclusive cause of the adverse employment action, only that it was one of the reasons "which made a difference." *Reisman v Regents of Wayne State Univ,* 188 Mich App 526, 539; 470 NW2d 678 (1991), quoting SJI2d 105.02. Once the plaintiff satisfies this burden of proof, the defendant may not merely articulate a nondiscriminatory reason for its actions. *Harrison, supra*. Rather, the cause is then presented to the factfinder for a determination of whether the plaintiff's allegations are true. *Id.*

In the instant case, plaintiff points to defendant's affirmative action and equal employment opportunity policy statement, arguing that it is direct evidence of unlawful discrimination. The policy statement expresses defendant's "commitment to equal opportunity and affirmative action in all aspects of the employment process." On appeal, plaintiff points to portions of the policy statement concerning defendant's efforts to prevent underutilization of protected groups, asserting that they demonstrate that defendant's unlawful consideration of his race caused it to deny him a promotion.

We decline to hold that defendant's affirmative action policy standing alone amounts to direct evidence of unlawful discrimination. This Court, adopting the Sixth Circuit Court of Appeal's analysis, has defined "direct evidence" as "evidence that, if believed, 'requires the conclusion that unlawful discrimination was at least a motivating factor'" in the adverse employment action. *Harrison, supra* at 610, quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997). Moreover, the record does not support plaintiff's assertion that affirmative action considerations played a role in his denial of a promotion. Although the record evidence does demonstrate that defendant may have compiled information relating to the applicants' races during the interview process, there is no indication in the record that unlawful racial discrimination made a difference in the decision whether to promote plaintiff. *Reisman, supra.* A review of the record in the light most favorable to plaintiff fails to reveal direct proof that discriminatory animus was causally related to defendant's decision regarding plaintiff's promotion. *Graham, supra*.

Additionally, we agree with the trial court that plaintiff has not made out a prima facie case of reverse discrimination to the extent that an inference of discrimination arises. To establish a prima facie case of reverse discrimination, a plaintiff must demonstrate:

> (i) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against [Caucasians]; (ii) that the plaintiff applied and was qualified for an available promotion; (iii) that, despite plaintiff's qualifications, he was not promoted; and (iv) that a [minority] employee of similar qualifications was promoted. [*Allen v Comprehensive Health Services*, 222 Mich App 426, 433; 564 NW2d 914 (1997), app dis 459 Mich 861 (1998).]

In our view, the record does not present background circumstances that support the suspicion that defendant is the unusual employer who discriminates against the majority. Plaintiff has not set forth evidence to demonstrate the disproportionate hiring of minorities. See, e.g., *Mills v Health Care Services Corp*, 171 F3d 450, 457 (CA 7, 1999) (disproportionate hiring of women demonstrates an inference of discrimination). Nor has plaintiff established that he possessed superior qualifications to the minority applicants who were offered the position of sergeant. *Herendeen v Michigan State Police*, 39 F Supp 2d 899, 908 (WD Mich, 1999); *Allen, supra* at 434 n 6. Furthermore, defendant's use of an affirmative action plan does not amount to suspicious circumstances to support a prima facie claim of reverse discrimination. See, e.g., *Parker v Baltimore & O R Co*, 209 US App DC 215, 221 n 9; 652 F2d 1012, 1018 n 9 (1981), cited with approval in *Allen, supra* at 431-432. In our view, plaintiff is hard-pressed to present evidence of suspicious circumstances in the instant case, where it is undisputed that defendant offered the position of sergeant to another Caucasian male.

Moreover, plaintiff has not demonstrated that he possessed similar qualifications to the applicants who obtained the position of sergeant. *Allen, supra* at 433. Rather, the record indicates that two of the minority applicants who were offered the position already held the position of sergeant and accepted lateral transfers to WWCF. Viewing the record evidence and all reasonable inferences arising from it in the light most favorable to plaintiff, we are satisfied

that the trial court correctly determined that plaintiff failed to set forth a prima facie claim of reverse discrimination sufficient to withstand summary disposition.

We affirm.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Brian K. Zahra